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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

ANGEL LOUIS PAEZ,

Defendant and Appellant.

E052278

(Super.Ct.Nos. SWF028153,  
SWF028434, SWF028436, &  
SWF028965)

OPINION

APPEAL from the Superior Court of Riverside County. Craig G. Riemer, Judge.

Affirmed as modified.

Gregory R. Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting, Kristin A.

Gutierrez and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

## INTRODUCTION

Defendant Angel Louis Paez (defendant) appeals as error the trial court's decision not to stay the prison sentences for two of his three convictions for active gang participation. (Pen. Code § 186.22, subd. (a).)<sup>1</sup> In light of the California Supreme Court's recent decision in *People v. Mesa*, we will affirm the judgment but modify the sentence to stay the two terms imposed for gang participation.

## FACTS AND PROCEDURAL HISTORY

Defendant, who was 19 at the time of the offenses delineated below, was a self-admitted member of the "San Ja First" criminal street gang. His record of juvenile offenses included, among others, second degree burglary (§ 459), gang participation (§ 186.22, subd. (b)), and carjacking (§ 215, subd. (a)).

Between April 9 and June 21, 2009, defendant was arrested four times. On April 9 he was found in a car with a loaded gun in his possession and methamphetamine in his sock. On April 24 he was stopped while driving a stolen car with two fellow San Ja gang members as passengers; when officers pulled him over, he fled on foot and was found hiding in a shed. On April 29 he was again found in possession of methamphetamine. On June 21 he was again found in possession of a loaded gun while a passenger in a vehicle with a fellow San Ja gang member. On April 15, April 26, and May 2, 2009, respectively, he posted bail in connection with the first three arrests. After the fourth arrest, bail was denied.

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

In an amended information filed March 16, 2010, the district attorney of Riverside County charged defendant with eight felonies (counts 1-8) and three misdemeanors (counts 9-11): possession of a controlled substance (methamphetamine) while armed with a loaded operable firearm (Health & Saf. Code § 11370.1, subd. (a) count 1); active participation in a criminal street gang (§ 186.22, subd. (a), counts 2, 4, 8); vehicle theft (Veh. Code § 10851, subd. (a), count 3); possession of methamphetamine (Health & Saf. Code § 11377, subd. (a), count 5); carrying a concealed firearm (§ 12025, subd. (b)(6), count 6); possession of a loaded firearm in a vehicle (§ 12031, subd. (a)(2)(F), count 7); possession of less than 28.5 grams of marijuana (Health & Saf. Code 11357, subd. (b), count 9); possession of drug paraphernalia (Health & Saf. Code § 11364, count 10); and resisting a peace officer (§ 148, subd. (a)(1), count 11). The information alleged that count 3 was committed for the benefit of a street gang (§ 186.22, subd. (b)), and that counts 3 through 8 were committed while defendant was out of custody on bail (§ 12022.1).

The gang-participation charge of count 2 was related to defendant's drug possession crime of April 9, 2009. The gang-participation allegations of counts 4 and 8 were related, respectively, to defendant's carjacking crime of April 24, 2009, and to his carrying-a-concealed-loaded-gun-in-a-vehicle crime of June 21, 2009. In both of the latter incidents, he was arrested in the company of fellow San Ja gang members.

On July 21, 2010, at the request of the prosecution, the court dismissed count 9 and three of the six bail enhancement allegations, leaving in place the bail enhancement

allegations on counts 1, 3, and 6. During defendant's trial,<sup>2</sup> police officers and gang experts testified extensively about the nature of gangs generally and defendant's membership and participation in the San Ja gang in particular. On July 29, 2010, the jury found defendant guilty of all the remaining counts and allegations.

On October 29, 2010, the court sentenced defendant to 14 years in state prison, calculated as follows: on count 3, the principal count, the mid-term of two years, plus three years for the gang participation enhancement, to run consecutively, and two additional years for the on-bail enhancement, also to run consecutively; on count 1, one year (1/3 the midterm); on count 2, the low term of 1 year 4 months, stayed pursuant to section 654; on count 4, the midterm of two years, to run concurrently, with the associated bail enhancement stricken; on count 5, eight months (1/3 the midterm), plus two years for the on-bail enhancement; on count 6, eight months (1/3 the midterm) plus two years for the on-bail enhancement; on count 7, two years, stayed pursuant to section 654 with the on-bail enhancement stricken; on count 8, eight months to run consecutively; on counts 10 and 11, six months each in county jail, to run concurrently with the rest of the sentence.

In pronouncing sentence, the court stated specifically that it had decided, pursuant to section 654, to stay the gang participation prison term for count 2 because that offense involved the same intent as count 1. The court did not stay the terms on counts 4 and 8

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<sup>2</sup> It appears that, at some earlier point in the case, defendant rejected an offer of five years and chose instead to go to trial.

because, it said, each of those crimes involved separate intents and had “independent objectives from their underlying felonies.”

### DISCUSSION

Defendant asserts that his sentences for active gang participation in counts 4 and 8, rather than just the one for count 2, should have been stayed pursuant to section 654. He relies exclusively upon this court’s prior decision in *People v. Sanchez* (2009) 179 Cal.App.4th 1297 (*Sanchez*) [Fourth Dist, Div. Two]. “Under *Sanchez*, the terms for count 4 and count 8 must be stayed.” The People suggest that *Sanchez* was “wrongly decided” because it is inconsistent with the long-established rule of *Neal v. State of California* (1960) 55 Cal.2d 11 (*Neal*), and with the Legislature’s purpose in enacting the California Street Terrorism Enforcement and Prevention Act (the STEP Act). (§ 186.20, et seq.) They urge us to instead adopt the reasoning of *People v. Herrera* (1999) 70 Cal.App.4th 1456 (*Herrera*), a case we analyzed in *Sanchez* and found unpersuasive. (*Sanchez, supra*, at pp. 1313-1314.)

#### *Sanchez and Herrera*

In *Sanchez*, we held that section 654 bars imposition of a separate, un-stayed, sentence for a gang participation conviction when the defendant is also convicted of the underlying felony. (*Sanchez, supra*, 179 Cal.App.4th at pp. 1315-1316.) Analogizing to the felony murder rule, we reasoned that, because the underlying felony is what transforms non-criminal “mere gang membership” into the crime of gang participation, if a defendant is found guilty of both, “the defendant’s intent and objective in committing

both offenses must be the same.” (*Id.* at pp. 1314-1315.) In so holding, we disagreed with *Herrera*, as well as with a number of similar cases. (*Id.* at p. 1312.)

In *Herrera*, a gang retaliation drive-by shooting, the appellate court concluded that the defendant’s act of gang participation was divisible from the underlying murder counts and, as a separate crime, was not subject to section 654. (*Herrera, supra*, 70 Cal.App.4th at pp. 1461, 1463, 1466.) “[I]f section 654 were held applicable here,” the court said, “it would render section 186.22, subdivision (a) a nullity whenever a gang member was convicted of the substantive crime committed in furtherance of the gang. . . . We do not believe the Legislature intended to exempt the most culpable parties from the punishment under the street terrorism statutes.” (*Id.* at p. 1468.)

#### *Mesa*

On June 4, 2012, the California Supreme Court issued a decision in *People v. Mesa* (2012) 54 Cal.4th 191, in which the majority agreed with the reasoning of *Sanchez* and rejected the reasoning of *Herrera*. (*Id.* at pp. 197-199.) We are bound by that decision. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Accordingly, pursuant to section 654, we will modify defendant’s sentence to stay the terms imposed for counts 4 and 8.

#### **DISPOSITION**

The sentence is modified to stay the terms imposed on count 4 and count 8. The clerk of the Riverside County Superior Court is directed to prepare an amended abstract of judgment reflecting this modification and to send a copy of the amended abstract to the

Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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RAMIREZ  
P. J.

We concur:

RICHLI  
J.

KING  
J.